

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**



76-7338

To be submitted by
JOSEPH D. AHEARN

United States Court of Appeals

FOR THE SECOND CIRCUIT

EDWARD M. ALEXANIAN,

Plaintiff-Appellant,

—against—

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, EDWARD LOGUE, ROBERT McCABE, JOHN BURNETT, DAVID OZERKIS, JOSEPH FIOCCA, WILLIAM H. HAYDEN, ROBERT G. HAZEN, ROBERT GERMANO, PHILIP SALOMINE and, THE CITY OF NEW YORK, SAM GANG, JUDA DICK, TWO CITY POLICE CAPTAINS and, NEW YORK STATE PARK COMMISSION FOR THE CITY OF NEW YORK, HORN CONSTRUCTION CORP., BLANDFORD CO., & OTHERS and, LEON D. DEMATTEIS & SONS, INC., ALPHONSE DEMATTEIS, ALAN HOWARD, VINCENT J. ARGIRO, NICHOLAS CAROZZA, COBRA PILE DRIVING CORP., COPPOLLA CONSTRUCTION CO., COPPOLLA BROS., ARCUS CONSTRUCTION CO., JAMES COPPOLLA, DIC CONCRETE CORP., DIC-UNDERHILL CO., NICHOLAS FASSINI, CASTALDO CRANE CORP., PAGE FENCE CO., STAR CIRCLE CONSTRUCTION CO., TRANSIT MIX CORP., COLONIAL SAND AND GRAVEL CORP., PASCAP SCRAP IRON CORP., BRONX IRON CORP., BROOKFIELD AUTO WRECKERS CO., DEBEVOISE, PLIMPTON, LYONS & GATES, STANDISH F. MEDINA, JR., JOSEPH H. SCHNABEL, LESLIE H. GOLDENTHAL, CHARLES A. LORETO, UNDER-SHERIFF OF BRONX COUNTY, WARDEN REINER, OF NEW YORK COUNTY JAIL, GOVERNOR & LEGISLATORS OF THE STATE OF NEW YORK and, several JOHN DOE CORPORATIONS and, ONE HUNDRED (100) OR MORE INDIVIDUAL JOHN DOES,

Defendants-Appellees.

Brief of Defendants-Appellees Leon D. DeMatteis & Sons, Inc., Alphonse DeMatteis, Allan Howard, Vincent J. Argiro, Nicholas Carozza, Cobra Pile Driving Corp., Arcus Concrete Corp., s/h/a Arcus Construction Co., The Dic Concrete Corporation s/h/a Dic Concrete Corp., and Dic-Underhill, a joint venture s/h/a Dic-Underhill Co.

MELE and CULLEN

Attorneys for Defendants-Appellees Leon D. DeMatteis & Sons, Inc., Alphonse DeMatteis, Allan Howard, Vincent J. Argiro, Nicholas Carozza, Cobra Pile Driving Corp., Arcus Concrete Corp., s/h/a Arcus Construction Co., The Dic Concrete Corporation s/h/a Dic Concrete Corp., and Dic-Underhill, a joint venture s/h/a Dic-Underhill Co.

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Introductory Statement

Plaintiff appeals from the order of Judge Duffy entered in the United States District Court for the Southern District of New York on June 18, 1976. In his memorandum and order, Judge Duffy held:

"Various motions have been made to dismiss the complaint herein. I have spent many hours reviewing the 293 paragraph document entitled 'Complaint,' particularly with a view to interpreting it in the most favorable light since the plaintiff is appearing pro se. It now appears clear to me that the allegations do not make out any justiciable cause of action.

"The action is dismissed.

"So ORDERED."

The instant complaint is 52 pages long and consists of 293 paragraphs. The complaint purports to assert 28 causes of action.

The salient facts relating to the background of the instant action are set forth in the affidavit of Standish F. Medina, Jr., sworn to May 17, 1976 in support of the motion to dismiss the complaint. The instant brief incorporates by reference the facts contained in said affidavit.

Previously, plaintiff had commenced an action in the United States District Court for the Southern District of New York (72 Cir. 2748) against the New York State Urban Development Corporation and the City of New York. Judge Brieant on June 29, 1972 dismissed plaintiff's complaint from the bench. This Court (Chief Judge Friendly, Judge Oakes and Judge Timbers) affirmed Judge Brieant's dismissal on January 22, 1973 (docket no. 72-1788).

POINT I

Judge Duffy properly dismissed the complaint herein upon the ground that the allegations did not make out any justiciable cause of action.

The present action arises out of the events surrounding the construction of the Harlem River Park Project between 1969 and 1973. The project was developed by the New York State Urban Development Corporation, a corporate governmental agency of the State of New York.

The defendants-appellees upon whose behalf the instant brief is being submitted, namely Leon D. DeMatteis & Sons, Inc., Alphonse DeMatteis, Allan Howard, Vincent J. Argiro, Nicholas Carozza, Cobra Pile Driving Corp., Arcus Concrete Corp., s/h/a Arcus Construction Co., The Die Concrete Corporation, s/h/a Die Concrete Corp., and Die-Underhill, a joint venture s/h/a Die-Underhill Co., are referred to throughout plaintiff's complaint either separately, or collectively as "the builder." As best as can be gleaned from the complaint, the allegations against these said defendants-appellees arise out of their actions concerning the construction of the project. No viable cause of action is spelled out in the complaint as against these defendants-appellees.

Firstly, there is no requisite diversity of citizenship jurisdiction (28 U.S.C. Section 1332(a)). Plaintiff's address on the summons states that his address is Bronx, New York. Furthermore, no valid claim has been asserted herein under federal law (28 U.S.C. Section 1331 (a)).

As can be seen from the affidavit of Mr. Medina, as well as from the complaint herein, the instant action is concerned with prior myriad proceedings in the New York State courts. It is respectfully submitted that even to

the extent that the allegations of the complaint could have been construed as alleging proper causes of action in breach of contract, fraud, harassment, defamation, etc., (which we deny), these claims are not cognizable in the federal courts. Indeed, as seen from Mr. Medina's affidavit and from the complaint herein, a tremendous amount of litigation arose out of the events complained of. In substance, all the instant claims as apparently set forth in the complaint were resolved in the prior state courts. Although notices of appeal were initially served by plaintiff in some of the prior New York State court actions and proceedings, no appeal was ever perfected in any action or proceeding. It is most respectfully submitted that even upon a liberal construction which is afforded a plaintiff *pro se*, the complaint herein does nothing more than to allege incorrect results in the prior New York State court proceedings. Plaintiff's sole proper remedy was to pursue and to exhaust his appellate remedies in the New York State courts. The substance of the complaint herein is, in essence, an attack upon the correctness of the prior state determinations and even assuming *arguendo* such determinations were wrong (which we deny), plaintiff should have pursued his appellate remedies.

In addition, to the extent that adverse determinations were rendered against plaintiff in the prior New York State actions and proceedings, such determinations, not being appealed from, bar plaintiff's action under firmly-embedded tenets of collateral estoppel (*Schwartz v. Public Administrator*, 24 NY2d 65).

Furthermore, regarding any matters not encompassed within the prior New York State court actions and proceedings, any relief at the present time against the defendants-appellees upon whose behalf the instant brief is submitted is not cognizable in the federal courts. All these defendants-appellees were private persons engaged in the

construction of a housing project. As against said defendants-appellees, no cognizable claim exists arising out of any alleged violations of plaintiff's rights under the United States Constitution. Even assuming *arguendo* that as against these defendants-appellees a cause of action exists (which we strongly and completely deny), such claims are not cognizable in the federal courts.

It *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 US 281, 26 L Ed 2d 234, 90 S Ct 1739, the Supreme Court held:

"While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions. Litigants who foresaw the possibility of more favorable treatment in one or the other system would predictably hasten to invoke the powers of whichever court it was believed would present the best chance of success. Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case.

* * *

"Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court" (398 US at 286-87).

The principle was reaffirmed in *Hoffman v. Pursue, Ltd.*, 420 US 592, 43 L Ed 2d 482, 95 S Ct 1200, where the Supreme Court held:

"Thus, appellee in this case was assured of eventual consideration of its claim by this Court. But quite apart from appellee's right to appeal had it remained in state court, we conclude that it should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which as we have already explained, is quite costly in terms of the interests which Younger seeks to protect" (420 US at 605-06).

It is most respectfully submitted that Judge Duffy, who spent many hours reviewing the complaint, was eminently correct in concluding that the allegations of the complaint did not make out any justiciable cause of action.

Judge Duffy correctly dismissed the complaint.

CONCLUSION

The order appealed from should be affirmed and this Court should grant any other relief which to this court seems just and appropriate.

Dated: New York, New York
November 17, 1976

Respectfully submitted,

MELE and CULLEN

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Construction Co., The Dic Concrete
Corporation s/h/a Dic Concrete
Corp., and Dic-Underhill, a Joint
Venture s/h/a Dic-Underhill Co.*

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United States Court of Appeals
For the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Edward M. Alexanian

Plaintiff-Appellant

against

New York State Urban Development Corporation et al.

Defendants-Appellees

State of New York, County of New York, ss.:

Raymond J. Braddick,
agent for Mele & Cullen

, being duly sworn deposes and says that he is
the attorney

for the above named Defendants-Appellees herein. That he is over
21 years of age, is not a party to the action and resides at Levittown, New York

That on the 17th. day of November, 1976, he served the within
Brief

- upon the attorneys for the parties and at the addresses as specified below
1. Edward M. Alexanian c/o Mr,s Jane M. Alexian 2454 Tiebout Ave. Bronx New York.
 2. Barrett Smith Schapiro & Simon 26 Broadway New York, New York
 3. W. Bernard Richland, Corp. Counsel Municipal Building New York, New York
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 6. Guozzo Silagi Craver & Perelson Esqs. 888 Seventh Avenue New York, New York
 8. Fredericks & Goldberger 175 Main Street White Plains, New York

by depositing 2 true copies to each
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned,
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 17th.
day of November, 1976

ROLAND W. JOHNSON,

Notary Public, State of New York

No. 4509705

Qualified in Delaware County

Commission Expires March 30, 1977

BEST COPY AVAILABLE